Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

HANS WEEREN, dba VENTURA MARINA AND LANDING, Petitioner,

v.

VENTURA GROUP LLC; JOHN SCOTT; CHANNEL HARBORS, INC.; STEARNS WHARF/PACIFIC HARBORS LTD.; AND MICHAEL S. KOGAN, CHAPTER 7 TRUSTEE, Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

John F. Shellabarger
SHELLABARGER & PATISON
928 Garden Street, Suite 3
Santa Barbara, CA 93101
(805) 962-4150
Counsel for Petitioner

37PP

QUESTION PRESENTED

1. In a bankruptcy case, is an appeal moot *per se*, without regard to whether the court can fashion any effective and equitable relief, where the appellant did not obtain a stay pending appeal, and the orders appealed from, involve disposition of property?

LIST OF PARTIES

The parties who participated in the proceedings in the District Court and Court of Appeals were Hans Weeren, dba Ventura Marina and Landing, Ventura Group LLC, John Scott, Channel Harbors Inc., Stearns Wharf/Pacific Harbors, Ltd., and Michael S. Kogan, Chapter 7 Trustee.

The parties to the Petition are:

Party(s)	Attorney
Hans Weeren, dba Ventura Marina and Landing	John F. Shellabarger, Esq. SHELLABARGER & PATISON 928 Garden Street, Suite 3 Santa Barbara, CA 93101 (805) 962-4150
Ventura Group LLC; John Scott; Channel Harbors Inc.; and Stearns Wharf/Pacific Harbors, Ltd.	Steven A. Snipper, Esq. SNIPPER, WAINER & MARKOFF 2029 Century Park East Suite 1690 Los Angeles, CA 90067-3001 (310) 557-1905
Michel S. Kogan, Chapter 7 Trustee	Julian Bach, Esq. ARTER & HADDEN, LLP 725 South Figueroa Street Los Angeles, CA 90017 (213) 430-3300

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HANS WEEREN, dba VENTURA MARINA AND LANDING, Petitioner,

v.

VENTURA GROUP LLC; JOHN SCOTT; CHANNEL HARBORS, INC.; STEARNS WHARF/PACIFIC HARBORS LTD.; AND MICHAEL S. KOGAN, CHAPTER 7 TRUSTEE, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, Hans Weeren, dba, Ventura Marina and Landing ("Petitioner"), respectfully prays that the Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on April 1, 1999.

OPINIONS BELOW

The Order of the Court of Appeals for the Ninth Circuit dismissing the appeals for mootness, was not reported and is reprinted in the Appendix hereto at page A-1 through A-2.

The Memorandum Opinion of the Bankruptcy Appellate Panel, which dismissed the appeals as moot, was not reported, and is reprinted in the Appendix hereto at pages A-3 through A-13.

JURISDICTION

The proceeding below involved two (2) appeals from two (2) final orders in a case filed under the United States Bankruptcy Code. Petitioner invoked the appellate jurisdiction of the Bankruptcy Appellate Panel of the Ninth Circuit, pursuant to 28 U.S.C. § 158, to review the orders of the Bankruptcy Court. The appeals were consolidated.

The Bankruptcy Appellate Panel ordered that the appeals be dismissed as moot and appeal was taken to the Court of Appeals, Ninth Circuit, which entered an order dismissing the appeals for mootness, on April 1, 1999. No Petition for Rehearing was sought.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

None

STATEMENT OF CASE

This proceeding arises out of a consolidated appeal of two (2) orders, which first the Bankruptcy Appellate Panel of the Ninth Circuit ("BAP"), and then later, which the Ninth Circuit Court of Appeals dismissed on mootness grounds. Petitioner seeks review of the dismissal of the appeals, not the orders, which have yet to be reviewed.

Petitioner filed a case under Chapter 11 of the United States Bankruptcy Code on November 8, 1996. Petitioner's primary asset was a sublease in the Ventura Harbor area, from which he operated the Ventura Marina. The sublessor was Ventura Group, LLC, who was the most recent in a line of successors, including, John Scott, Channel Harbors Inc., Stearns Wharf/Pacific Harbors Ltd. (all are collectively referred to herein as "Ventura Group"). The subleased property consisted of boat slips, which the Debtor rented to individual boat owners.

On January 27, 1997, Petitioner filed a motion in the Bankruptcy Court to assume the sublease, pursuant to 11 U.S.C. § 365. Ventura Group opposed the motion, arguing, among other things, that Petitioner was substantially in arrears on the pre-petition rents, and should not be allowed to assume the sublease.

After a series of hearings, the Bankruptcy Court eventually ordered that Petitioner was to deliver a cashier's check for $40,000 to Ventura Group and to pay attorneys fees to Ventura Group's counsel of $2,180. Petitioner disputed both the amount in the order and the conditions. When the Petitioner failed to make the payments by the time limits set by the Bankruptcy Court, on March 3, 1997, the Bankruptcy Court, entered an order denying Petitioner's assumption of the sublease and further ordered the lease terminated and that Petitioner surrender the real property, pursuant to 11 U.S.C. § 365(d)(4). Petitioner appealed the order to the BAP of the Ninth Circuit.

The case was thereafter converted to one under Chapter 7 of the United States Bankruptcy Code, and Michael S. Kogan was appointed Chapter 7 Trustee ("Chapter 7 Trustee"). The Chapter 7 Trustee and Ventura Group agreed to settle both the appeal related to the denial of the assumption of the sublease, as well as a state court litigation between Petitioner and Ventura Group, in exchange for dismissal of both matters and payment of $27,500 by Ventura Group to the Chapter 7 Trustee. The Chapter 7 Trustee's motion to approve the compromise, was approved by the Bankruptcy Court by order entered February 19, 1998, over Petitioner's opposition. Appeal was taken to the BAP by Petitioner.

In the BAP, the two (2) appeals were consolidated. On May 12, 1998, Ventura Group filed with the BAP, a "Motion to Render Appeal as Moot and For Dismissal of Appeal" ("Motion"). The Motion claimed that the appeals were moot because Petitioner did not obtain a stay of the orders pending appeal and further alleged by

declaration of counsel for Ventura Group, that the funds were paid by Ventura Group pursuant to the settlement, to the Chapter 7 Trustee and that Ventura Group had entered new long-term leases and reconfigured and repaired the docks. Petitioner opposed the Motion, on, among other grounds, by citing the case of Spirtos v. Moreno (9th Cir. 1993) 992 F.2d 1004, 07, for the proposition that as long as a court can fashion relief that is both effective and equitable, an appeal does not become moot, notwithstanding the absence of a stay, and pointing out that Ventura Group failed to provide any details of the repairs or the leases that it claimed.

The BAP ordered the appeals dismissed, by Memorandum Opinion ("BAP Opinion"), filed October 29, 1998. See A-3. The BAP Opinion held that the line of case applicable, that rendered the appeals moot and "[came] into play when an order authorized the disposition of property of the estate." (A-11) The BAP cited In re Onouli-Kona Land Co. (9th Cir. 1988) 846 F.2d 1170, 1172-73 and In re Ewell (9th Cir. 1992) 958 F.2d 276, 280.

The BAP stated:

> These cases hold that "when an appellant fails to obtain a stay from an order that permits a sale of the debtor's asset, the appeal will be rendered moot regardless of whether the purchaser has taken irreversible steps following the sale." In re Vista Del Mar Assoc., Inc., 181 B.R. 422, 424 (9th Cir. BAP 1995) (citing Onoui-Kona, 846 F.2d at 1172). The Ninth Circuit in Onouli-Kona, citing Algeran [Algeran, Inc. v. Advance

Ross, Corp., (9th Cir. 1985) 759 F.2d 1421] stated "[w]hether an order directly approves the sale or simply lifts the automatic stay, the mootness rule dictates that the appellant's failure to obtain a stay moots the appeal." Onouli-Kona, 846 F 2d at 1171. (A-11 and A-12)

Petitioner then appealed to the Court of Appeals for the Ninth Circuit. Ventura Group filed a motion to dismiss for mootness, which the Court of Appeals summarily granted, without providing plenary review, citing Onouli-Kona Land Co., supra. (See A-1 through A-2) The order dismissing the appeals was filed on April 1, 1999.

REASONS FOR GRANTING WRIT

I. WHETHER AN APPEAL CAN BE DISMISSED FOR "MOOTNESS" IN A BANKRUPTCY CASE WHERE NO STAY WAS OBTAINED, WITHOUT CONSIDERING WHETHER EFFECTUAL AND EQUITABLE RELIEF COULD BE FASHIONED, IS AN IMPORTANT QUESTION THAT HAS NOT BEEN DECIDED BY THIS COURT.

A doctrine has developed in the lower courts concerning appeals from final orders in bankruptcy cases. This doctrine is used by appellate courts to dismiss appeals, regardless of the merit of the arguments, when an appellant has not obtained a stay of the order appealed from, pending appellate review. Thereby terminating an appellant's right to

review, and as is in this case, depriving the appellant of property without the ability to challenge the Bankruptcy Court order that took away his property. The cases cited by the BAP and the Court of Appeals below, express no concern with the equities of the parties before the court or even if meaningful relief could be fashioned.

Mootness outside of a bankruptcy appeal, ordinarily means that "an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed." Church of Scientology of California v. United States, (1992) 506 U.S. 9, 12, 113 S.Ct. 447, 449, 121 L.Ed. 2d 313 (quoting Mills v. Green (1895) 159 U.S. 651, 653, 16 S.Ct. 132, 133, 40 L.Ed. 293.

However, in the bankruptcy appellate arena, courts have applied a doctrine that has been referred to at various times as "bankruptcy's mootness rule," See In re Onouli-Kona Land Co., supra or "equitable mootness." See In re Continental Airlines (3rd Cir. 1996) 91 F.3d 553, 558.

One aspect of bankruptcy's mootness rule deals with orders that authorize the sale of property. The circuits are in conflict as to whether or not a *per se* rule applies that requires the appeal dismissed for mootness when an appellant fails to obtain a stay pending appeal. One line of cases provides a *per se* rule. The case cited by the BAP and the Court of Appeals is representative, In re Onouli-Kona Land, Co., supra. In this line of case, the courts that espouse the *per se* rule:

> [E]mphasize[ ] the "particular need" for finality in bankruptcy. Giving little weight to the ability or inability of the court to afford relief, we have analyzed the lack of a stay as a jurisdictional bar to the appeal. In re Onouli-Kona Land Co., supra, at 1176, citing In re Community Thrift & Loan v. Suchy (In re Suchy (9th Cir. 1985) 786 F.2d 900, 901-02.) See also In re 255 Park Plaza Associates Ltd. Partnership (6th Cir. 1996) 100 F.3d 1214.

Under the *per se* rule, the appeal is moot, whether there is an order directly approves a sale of property, or merely lifts the automatic stay. In re Onouli-Kona, supra at 1171. See also Miami Ctr. Ltd. Partnership v. Bank of NY (11th Cir. 1988) 838 F.2d 1547, 1553. The rule applies whether or not irreversible steps were taken by the party acquiring the property. In re Onouli-Kona, supra at 1172.

Other courts that follow the *per se* rule include the First, Second, Fifth, Seventh, Eleventh and District of Columbia Circuits. See Pittsburgh Food & Beverage, Inc. v. Ranollo (3rd Cir. 1997) 112 F.3d 645, 649-51, citing cases that following the *per se* rule.

While not the majority rule, a minority of courts look to whether a remedy can be fashioned. In re Krebs Chrysler-Plymouth, Inc. (3rd Cir. 1998) 141 F.3d 490; In re Osborn (10th Cir. 1994) 24 F.3d 1199.

These courts are no less concerned with the limitation of 11 U.S.C. § 363(m) than the courts that follow

the *per se* rule. But they are willing to investigate the possibilities to achieve a fair and equitable outcome, not a procedurally devised outcome.

11 U.S.C. § 363(m) provides:

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

This limitation does not apply to the facts of this case. Ventura Group obtained possession by an order denying the assumption of the sublease and operation of 11 U.S.C. § 365(d)(4), which required immediate surrender of the property. There have been no cases discovered that applies bankruptcy's mootness rule to the facts of this case, i.e., the denial of an assumption of a lease. But both the BAP and the Court of Appeals must have assumed that the turnover of subleased property pursuant to 11 U.S.C. § 365(d)(4) was analogous to a sale of property under 11 U.S.C. § 363. Accepting that assumption for argument, those cases that do not follow the *per se* rule are instructive. First, from the language of 11 U.S.C. § 363(m) and 11 U.S.C. § 364(e) (the companion statute related to obtaining credit), there is no support for a *per se* rule.

> There is no escape from the logic that inasmuch as § 364(e) provides for the consequences of the reversal or modification of an order under 364(d) when the order has not been stayed pending appeal, it is impossible to conclude that § 364(e) in itself requires that an appeal be dismissed if a stay is not obtained. After all, neither Swedeland nor anyone else can explain how there can be a "reversal or modification" of an order, if the appeal from the order has been dismissed. In re Swedeland Dev. Group, Inc. (3rd Cir. 1994) 16 F.3d 552, 559, construing 11 U.S.C. § 364(e) and quoted in In re Krebs Chrysler-Plymouth Inc., supra at 499, construing 11 U.S.C. § 363(m).

Second, these cases show that it is possible for a court of appeals to determine whether a remedy can be fashioned.

In the case at bar, the Court of Appeals made a summary determination and thus made no inquiry into whether or not any relief could be had by Petitioner. Further, to the extent that the BAP Opinion considered the effects of Petitioner not obtaining a stay, those considerations were mere speculation. First, the evidence before the Court failed to reveal any details from which the BAP could conclude any changes in circumstance or effects on third parties not before the Court. Second, the BAP did not consider whether or not any effectual remedy could be fashioned.

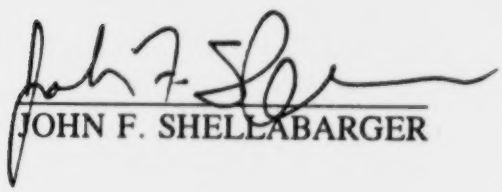
Petitioner was denied his property by orders of the Bankruptcy Court that he contends were made in error. But Petitioner was denied his ability to challenge the orders by reviewing courts that applied a rule of expediency, over equity. This Court should entertain this question because a court can never decide a case based on entropy, and still be a court of justice.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

John F. Shellabarger
SHELLABARGER & PATISON
928 Garden Street, Suite 3
Santa Barbara, CA 93101
(805) 962-4150
Counsel for Petitioner



JOHN F. SHELLABARGER

FILED
APR -1 1999
Cathy A. Catterson, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: HANS WEEREN, dba Ventura Marina and Landing, Debtor.	No. 99-55086 BAP No. CC-98-1154-JBRi Bankruptcy Appellate Panel
HANS WEEREN, Appellant, v. VENTURA GROUP LIMITED, et al., Appellees.	
In re: HANS WEEREN, dba Ventura Marina and Landing, Debtor.	No. 99-55090 BAP No. CC-97-1169-JBRi Bankruptcy Appellate Panel
HANS WEEREN, Appellant, v. VENTURA GROUP LIMITED, et al., Appellees.	ORDER

99-55086, 99-55090

Before: SNEED, KOZINSKI and LEAVY, Circuit Judges

Appellant's motion to file a late opposition to appellees' motion to dismiss is granted.

Appellees' motion to dismiss these appeals for mootness is granted. *See Onoui-Kona Land Co. v. Estate of Richards (In re Onoui-Kona Land Co.)*, 846 F.2d 1170, 1172-73 (9th Cir. 1988). Accordingly, the appeals are dismissed.

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re HANS WEEREN, DBA VENTURA MARINA AND LANDING, Debtor.	)	BAP Nos. CC-97-1169-JBRi CC-98-1154-JBRi Bk. No. ND 96-14714RR
HANS WEEREN, Appellant, v. VENTURA GROUP LIMITED; MICHAEL S. KOGAN, Chapter 7 Trustee, Appellees.	)	MEMORANDUM[1] FILED OCT 29, 1998 NANCY B. DICKERSON CLERK US BKCY. APP. PANEL OF THE NINTH CIRCUIT

Argued and Submitted on September 24, 1998

at Pasadena, California

Filed - October 29, 1998

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this Circuit except when relevant under the doctrines of the law of the case, res judicata, or collateral estoppel. See BAP Rule 13 and Ninth Circuit Rule 36-3.

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Robin L. Riblet, Bankruptcy Judge, Presiding

Before: Jones, Brandt and Rimel[2], Bankruptcy Judges.

The Debtor appeals two bankruptcy court rulings. First, the Debtor appeals the denial of the Debtor's motion to assume a marina sublease (BAP No. CC-98-1169.) The Debtor claims the bankruptcy court erred in denying his motion to assume the sublease because the bankruptcy court refused to continue the evidentiary hearing on the motion and also required the Debtor to pay the $40,000 needed to cure the default under the sublease within ten days after the court's ruling. Second, the Debtor appeals the bankruptcy court's order granting the trustee's motion to compromise claims (BAP No. CC-98-1154.) The Debtor claims the bankruptcy court erred in approving the Trustee's motion to compromise claims because the trustee did not give the bankruptcy court enough information to make an informed judgment on whether to compromise the claim and because not all creditors were given notice of the motion to approve the compromise. The Debtor failed to obtain a stay pending appeal and the compromise agreement has been consummated. We DISMISS the appeals as

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[2] Hon. Whitney Rimel, Bankruptcy Judge for the Eastern District of California, sitting by designation.

MOOT.

I. FACTS

In 1988 the Debtor, Hans Wereen [sic], sublet a portion of Parcel 20 in the Ventura Harbor area on which he operated the Ventura Marina. Ventura Group, LLC ("Ventura Group") is the successor in interest to the original sublessor of the Debtor.[3] The subleased property is composed of boat slips which the Debtor rented to individual ship owners.

The Debtor's sublease required him to pay 25.5% of the gross receipts from the operation of the marina to Ventura Group. The sublease also required the Debtor to submit monthly accountings of all rent received, submit to audits, and to keep full books for all receipts relating to the premises for a period of two years after the close of each calendar year.

At some point after 1993, the Debtor was sued by one of the Debtor's sub-tenants in the marina, Chan J. Choi, in Ventura County Superior Court (the "Choi litigation"). Mr. Choi alleged breach of contract on the part of the Debtor. The Debtor filed a cross-complaint against Ventura Group in the Choi litigation for their alleged failure to perform obligations under the sublease and

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[3] At various times throughout the Debtor's possession of the marina sublease the sublessor was John Scott, Channel Harbor, Inc., Sterns Wharf/Pacific Harbors, Ldt., a finally Ventura Group, LLC. For continuity with the record, these entities will be collectively referred to as the "Ventura Group."

for interference with economic relations.

On October 22, 1996, Ventura Group filed an unlawful detainer action against the Debtor alleging that the debtor [sic] had failed to remit the full amount of rent owing to Ventura group [sic], failed to produce accounting statements and that the Debtor was asserting offsets in rents for such items as utilities and rent on his own boat slip, all of which were breaches of the sublease agreement.

On November 8, 1996, the Debtor filed for Chapter 11 relief. The Debtor listed as his primary asset the sublease of the marina. Ventura Group obtained relief from the stay in order to prosecute the unlawful detainer action in state court. That case was ultimately dismissed due to a deficiency in the notice requirement.

On January 7, 1997, the Debtor filed a motion to assume the marina sublease. The Debtor admitted under-paying rents for the years 1995 and 1996. The Debtor estimated that the amount needed to cure the defaults in rent for 1995 and 1996 were [sic] $8,338.59. The debtor offered to give Ventura Group a cashier's check in that amount.

Ventura Group opposed the Debtor's motion claiming that the sublease with the Debtor had in fact been validly terminated pre-petition. Alternatively, Ventura Group argued that even if the court accepted the Debtor's figures, which Ventura Group disputed, the Debtor was in arrears over $30,000 on pre-petition rents. Ventura Group argued that the debtor [sic] should not be allowed

to assume the sublease.

The hearing on the Debtor's motion to assume the sublease was originally set for February 5, 1997. On that date the bankruptcy court continued the hearing until February 18, 1997, in order to have an evidentiary hearing. The Debtor did not attend the continued hearing. In fact, the Debtor's attorney called no witnesses. The Debtor's attorney instead moved for a further continuance of the hearing. The bankruptcy court did not grant a continuance and allowed Ventura Group to call its witness.

At the conclusion of the evidentiary hearing the bankruptcy court ruled that the Debtor had until February 28, 1997, to deliver a cashier's check in the amount of $40,000 to be held in a segregated trust account with the Ventura Group's attorneys. The bankruptcy court also sanctioned the Debtor for the "wasted hearing" wherein the Debtor failed to appear to testify as to his method of accounting. The bankruptcy court ordered that the Debtor pay the attorney's costs for Ventura Group's attorneys appearance at the hearing. These fees totaled $2,180.

The bankruptcy court scheduled a further hearing for April 18, 1997, to allow the Debtor to personally appear and explain his method of accounting. However, the bankruptcy court informed the Debtor's counsel that if the $40,000 cashier's check or the attorney's fees were not paid by February 28, 1997, the bankruptcy court would enter an order denying the Debtor's motion to assume the sublease.

The Debtor failed to provide the money as instructed by the bankruptcy court. On March 3, 1997, the bankruptcy court entered an order denying the Debtor's motion to assume the marina sublease. Debtor appealed from that order (BAP No. CC-97-1169.)

Thereafter, the Debtor's case was converted to a chapter 7 proceeding. On August 5, 1997, Michael Kogan was appointed as the chapter 7 trustee (the "trustee"). The trustee and Ventura Group commenced negotiations concerning a possible settlement of both the appeal noted above as well as the Choi litigation in which the Debtor had filed a cross-complaint against Ventura Group.

On December 24, 1997, the trustee filed a motion to approve the compromise of controversy (the "settlement agreement"). The settlement agreement provided that the Ventura Group would pay the bankruptcy estate $27,500 in return for the dismissal of both the BAP appeal and the Choi litigation. The Debtor opposed the settlement agreement. The Debtor's sole basis for opposing the settlement agreement was that the trustee failed to provide the court with enough information on which to make its determination that the compromise was fair and reasonable. The Debtor claims that the Choi litigation claim had a potential value of $500,000 and that the subleased property was worth $650,000.

The bankruptcy court refused to accept Debtor's valuation of the property as unsubstantiated by competent evidenced. At the conclusion of the hearing the bankruptcy court approved the

settlement agreement. The Debtor appeals this order as well (BAP No. CC-98-1154.)

The Debtor did not seek a stay of the order approving the settlement agreement. Ventura Group claims to have already paid the settlement funds to the chapter 7 trustee. Ventura Group claims to have made improvements to the docks which were becoming "run down and unsafe" and to have entered into numerous new subleases covering the docks.

On May 12, 1998, Ventura Group filed a "Motion to Render Appeal Moot and for Dismissal of Appeal" with the Bankruptcy Appellate Panel. Ventura Group recounts the above facts and claims that the bankruptcy court's approval of the settlement, the Debtor's failure to obtain a stay pending appeal, and the consummation of the settlement render these appeals moot. The Debtor opposes the motion claiming that it would be an "injustice" to dismiss the appeals because the briefs are already filed. Further, the Debtor claims that because the parties to the original sublease are before the Panel, the Panel can fashion some form of equitable relief.

II. ISSUES

Whether the Debtor's failure to obtain a stay pending appeal from the motion to compromise renders these appeals moot.

III. STANDARD OF REVIEW

Mootness is a jurisdictional issue that the appellate court reviews de novo. In re Arnold & Baker Farms, 85 F.3d. 1415, 1419 (9th Cir. 1996), cert. denied, __ U.S. __, 117 S.Ct. 681, 136 L.Ed.2d 607 (1997).

IV. DISCUSSION

At the outset this Penal must address whether events occurring after the approval of the settlement agreement have rendered the present appeals moot. After the Debtor's chapter 11 case was converted to a chapter 7 proceeding, Ventura Group and the trustee entered into a settlement agreement providing for the settlement of the Debtor's first appeal as well as the Debtor's cross-complaint against the Ventura Group in the Choi litigation. The bankruptcy court entered an order approving the settlement agreement. The record does not reflect whether the Debtor attempted to get a stay pending appeal of that order from the bankruptcy court or from the Bankruptcy Appellate Panel. What is uncontroverted, however, is that the Debtor never obtained a stay of the settlement order.

Ventura Group asserts that it has paid the trustee the $27,500 agreed upon in the settlement agreement. Further, Ventura Group alleges that they have begun repairs to the marina and have entered in to [sic] new sub-leases. The Debtor counters that it would be inequitable to dismiss the appeals at this point

because they have already been fully briefed. Further, the Debtor contends that because Ventura Group does not name who the new subleases are it would be improper to dismiss as moot the present appeals because there is no evidence that the rights of third parties have intervened.

Mootness is a judicial doctrine which developed from two general rules: "the general rule that the occurrence of events which prevents an appellate court from granting effective relief renders an appeal moot, and the particular need for finality in orders regarding stays in bankruptcy." Algeran, Inc. v. Advance Ross Corp., 759 F.2d 1421, 1424 (9th Cir. 1985). Pursuant to these rules the Ninth Circuit has developed two lines of cases. One line of cases focuses on the court's ability to fashion meaningful relief. In re Baker & Drake, Inc., 35 F.3d 1348, 1351-52 (9th Cir. 1994); In re Spirtos, 992 F.2d 1004 (9th Cir. 1993).

The other line of cases, which applies int he present case, comes in to [sic]) play when an order authorizes the disposition of property of the estate. This line of cases emphasizes the particular need for finality of such orders. In re Onouli-Kona Land Co., 846 F.2d 1170, 1172-73 (9th Cir. 1988); In re Ewell, 958 F.2d 276, 280 (9th Cir. 1992). These cases hold that "when an appellant fails to obtain a stay from an order that permits a sale of the debtor's asset, the appeal will be rendered moot regardless of whether the purchaser has taken irreversible steps following the sale." In re Vista Del Mar Assoc., Inc., 181 B.R. 422, 424 (9th Cir. BAP

1995) (citing Onouli-Kona, 846 F.2d at 1172). The Ninth Circuit in Onouli-Kona, citing Algeran, stated "[w]hether an order directly approves the sale or simply lifts the automatic stay, the mootness rule dictates that the appellant's failure to obtain a stay moots the appeal." Onouli-Kona, 846, F.2d at 1171.

In the present case the sublease the Debtor seeks to assume has been released to Ventura Group. It is uncontroverted that the Ventura Group has invested money in the repair of the marina as well as entered into new sub-leases with new tenants. Pursuant to the above cited authority, the Debtor's appeals have become moot. The record does not reflect that the Debtor even attempted to obtain a stay pending appeal. While this case was on appeal, Ventura Group continued to repair and re-lease the marina to third parties. A reversal of the bankruptcy court's order would require that Ventura Group dissolve the new leases, displace third parties, and perhaps spawn a new series of litigation based on the displacement of the new sub-leasees.

One of these appeals (CC-97-1169) may be moot for another reason: the Debtor failed to obtain (or even seek) a stay pending appeal of the order denying his motion to assume the lease, and there is no apparent reason why the extended § 365(d)(4) period did not continue to run and expire. As the issue was neither briefed nor argued, we do not decide it.

Consequently, pursuant to the Onouli-Kona case, we DISMISS these appeals as MOOT.

V. CONCLUSION

These appeals are moot. The Debtor failed to obtain a stay pending appeal of the settlement agreement which proposed to dismiss the Debtor's first appeal as well as settle the Choi litigation. As a result of Debtor's failure to obtain a stay, the marina property has been returned to Ventura Group which has invested money in repairing and re-leasing the marina to third parties. As the rights of third parties have intervened, we DISMISS the present appeals as MOOT.

Supreme Court, U.S.
FILED
AUG 2 1999
OFFICE OF THE CLERK

No. 99-45

In The

Supreme Court of the United States

HANS WEEREN dba VENTURA MARINA and LANDING,

Petitioner,

vs.

VENTURA GROUP, LLC; JOHN SCOTT; CHANNEL HARBORS, INC.; STEARNS WHARF/PACIFIC HARBORS LTD; AND MICHAEL S. KOGAN, Chapter 7 Trustee,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

JULIAN BACH
Counsel of Record
ARTER & HADDEN, LLP
725 S. Figueroa Street, 34th Floor
Los Angeles, California 90017
Telephone: (213) 430-3300
Facsimile: (213) 617-9255

Counsel for Respondent, Michael S. Kogan, Chapter 7 Trustee

RICHARD I. WIDEMAN
Attorney at Law
27 El Paseo
Santa Barbara, California 93101
Telephone: (805) 884-9521
Facsimile: (805) 884-9531

Counsel for Respondents Ventura Group, LLC; John Scott; Channel Harbors, Inc.; and StearnsWharf/Pacific Harbors Ltd.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

The issue presented is whether the appeal by a Chapter 7 Debtor of an order approving the Chapter 7 Trustee's compromise agreement to sell assets of the estate should be dismissed as moot if the Chapter 7 Debtor fails to obtain a stay of the order pending appeal. Debtor asserts that his right to appeal survived the Trustee's settlement. 11 U.S.C. § 363(m), which codifies in part the bankruptcy mootness rule, provides that the reversal or modification on appeal of an order authorizing the sale or lease of property of a bankruptcy estate does not affect the validity of the sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

LIST OF INTERESTED PARTIES

The parties to the proceedings below were Petitioner, Hans Weeren dba Ventura Marina and Landing, Debtor in the Chapter 7 proceedings below.

Respondent Michael S. Kogan is the Chapter 7 Trustee for the bankruptcy estate of Hans Weeren dba Ventura Marina and Landing. Additional Respondents are VENTURA GROUP, LLC; JOHN SCOTT; CHANNEL HARBORS, INC.; STEARNS WHARF/PACIFIC HARBORS LTD, the adverse parties in proceedings below.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Michael S. Kogan, the Chapter 7 Trustee, Ventura Group LLC, John Scott, Channel Harbors, Inc., and Stearns Wharf/Pacific Harbors LTD respectfully request that the Court deny the petition for a writ of certiorari seeking review of the Order of the Court of Appeals for the Ninth Circuit, filed on April 1, 1999, dismissing the subject appeals as moot.

STATEMENT OF THE CASE

This matter involves consolidated appeals arising out of the Bankruptcy Court's Orders (1) Denying the Debtor-In-Possession's Motion to Assume Sub Lease (*Ninth Circuit Appeal No. 99-55086*), and (2) Approving the Compromise of a Controversy between Michael S. Kogan, the Chapter 7 Trustee of the bankruptcy estate of Hans Weeren dba Ventura Marina (the "Trustee"/"Respondent") and Ventura Group, LLC, John Scott, Channel Harbors, Inc. and Sterns Wharf/Pacific Harbors, Ltd. (the "Ventura Group") (*Ninth Circuit Appeal No. 99-55090*).

Petitioner Hans Weeren dba Ventura Marina and Landing (hereinafter "Petitioner") was the sub-lessee of a marina premises located at 1560 Anchors Way, Ventura, California 93001 ("subleased property") from D.L.K., Inc., a California Corporation, for a term running for 24 years and 10 months, commencing on April 1, 1988. Ventura Group LLC subsequently became the master tenant from D.L.K., Inc. as successor from parties identified as John Scott, Stearns Wharf/Pacific Harbors, Ltd. and Channel

Harbors, Inc. (hereinafter the "Ventura Group"). The subleased property was composed of boat slips which were rented out by Petitioner.

Some time after 1993, Petitioner was sued by another sub-tenant in the marina, Chan J. Choi, in Ventura County Superior Court, Case No. CIV 153849 (the "Choi litigation") for breach of contract. Petitioner cross-complained against the Ventura Group in the Choi litigation for alleged failures to perform obligations under the original sublease between Petitioner and D.L.K., Inc., including breach of lease, interference with economic relations and specific performance of the lease.

At some point, Petitioner defaulted under the terms of his sub-lease by, among other things, becoming delinquent in percentage rent, failing to produce the requisite audited accounting statements, and by asserting offsets against rent for such items as utilities, his own boat slip and certain office related expenses – none of which were authorized under the terms of the sublease. Due to these defaults, on or about October 22, 1996, Ventura Group commenced eviction proceedings against Petitioner. On November 8, 1996, or on the eve of the trial in the Choi litigation, Petitioner filed for relief under Chapter 11 of the United States Bankruptcy Code.

On or about January 7, 1997, Petitioner filed a Motion to Assume the sublease between Petitioner and the Ventura Group, with the hearing on the Motion originally set for February 5, 1997 and continued for an evidentiary hearing on February 18, 1997. At the continued hearing, Petitioner did not appear and his Counsel was not

"ready". The Ventura Group opposed the lease assumption, and argued that Petitioner had not established his ability to perform under the sublease. The Bankruptcy Court found that Petitioner was in default under the sublease, but granted Petitioner a continuance to present evidence of his ability to perform, on condition that he deposit $40,000.00 into a trust account and pay sanctions of $2,180.00 on or before the close of business on February 28, 1997. The order further provided that in the event the Petitioner failed to pay the monies by that date, the Ventura Group could submit a Declaration and Order denying Appellant's Motion to Assume the Sublease.[1]

Petitioner failed to timely tender the $40,000.00 and pay the sanctions, and on March 3, 1997, the Court entered an Order Denying the Motion To Assume Sublease. Since that time, the Ventura Group has invested money in the repair of the marina as well as entered into new sub-leases with new tenants.

On or about March 6, 1997, Petitioner appealed the Court's Order Denying the Motion to Assume to the Bankruptcy Appellate Panel for the Ninth Circuit (the "BAP"), BAP Appeal No. CC 97-1169 ("BAP Appeal No. 1").

In late July 1997, on Motion by the Office of the United States Trustee based upon Petitioner's failure to comply with various filing requirements and for Petitioner's failure to file a Disclosure Statement and Plan of Reorganization, the bankruptcy case was converted to a Chapter 7 proceeding. Respondent Michael S. Kogan was

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[1] It should be noted that Petitioner never objected to any of the conditions ordered by the Court at the evidentiary hearing.

and is the duly appointed and acting Chapter 7 Trustee as of August 5, 1997.

In December 1997, Respondent and the Ventura Group negotiated and entered into a Settlement Agreement, whereby for the sum of $27,500.00, the Trustee agreed to settle all controversies between the estate and the Ventura Group *relating to the sublease*. This included BAP Appeal No. 1, and the cross-complaint filed by Appellant in the Choi litigation. The Compromise was approved by the Court by Order dated February 13, 1998, and the Ventura Group paid the $27,500.00 to the Trustee. Petitioner likewise appealed the Order Approving the Compromise to the BAP, BAP Appeal No. 1154 ("BAP Appeal No. 2").

Petitioner failed to request a stay pending the appeal for either BAP Appeal No. 1 or BAP Appeal No. 2. After consolidation of the appeals, and after oral argument on the consolidated appeals and motion of the Ventura Group, the appeals were dismissed by the BAP as moot by Memorandum filed on October 29, 1998.

Petitioner thereafter appealed the final order from the BAP to the Ninth Circuit Court of Appeals. The appeals were likewise dismissed as moot by the Ninth Circuit Court of Appeals by an Order filed on April 1, 1999.

REASONS FOR DENYING THE WRIT

I.

THERE ARE NO COMPELLING FACTORS PRESENT IN THIS CASE FOR WHICH THE COURT SHOULD GRANT CERTIORARI.

Generally, there is only a limited basis upon which the Supreme Court will grant certiorari. This includes a need to resolve intercircuit conflicts, if the intercircuit split threatens the consistency of federal law (See, e.g., *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 661, 113 S.Ct. 1732, 1736, 91 L.Ed.2d 202 (1993)); if the case involves vital constitutional issues that are necessary to a decision of the case (See, e.g., *Clinton v. Jones*, 520 U.S. 681, 117 S.Ct. 1636, 1642, 137 L.Ed.2d 945 (1997)); if the case involves significant issues of public policy (See, e.g., *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 585, 113 S.Ct. 2786, 2792, 125 L.Ed.2d 469 (1993)); or if the case involves an interpretation of federal statutes (See, e.g., *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 608, 113 S.Ct. 1701, 1705, 123 L.Ed.2d 338 (1993)). Respondent asserts that the issue raised by Petitioner falls into none of these categories.

In this case, the Ninth Circuit dismissed the consolidated appeals because the bankruptcy code authorizes the Chapter 7 Trustee to dispose of property of the bankruptcy estate through settlement, because the Bankruptcy Court approved the settlement, and because the Petitioner failed to seek and/or obtain a stay of the order approving the settlement. The law is well settled in the Ninth Circuit, along with an overwhelming majority of the circuits, that when an Order authorizes the disposition of property of

the estate, and an appellant fails to obtain a stay from an Order that permits the sale of the debtor's assets, the Appeal will be rendered moot regardless of whether the purchaser has taken irreversible steps following the sale. *In re Vista Del Mar Assoc., Inc.*, 181 B.R. 422, 424 (9th Cir. BAP 1995).[2] The Ninth Circuit in *In re Onouli-Kona Land Co.*, 846 F.2d 1170, 1172-73 (9th Cir. 1988) stated "[w]hether an order directly approves the sale or simply lifts the automatic stay, the mootness rule dictates that the appellant's failure to obtain a stay moots the appeal." *Id.* at 1171; see, also, *In re Ewell*, 958 F.2d 276, 280 (9th Cir. 1992). These cases focus upon the need for finality of bankruptcy court orders.

This bankruptcy mootness rule is codified, in part, in 11 U.S.C. § 363(m), which provides:

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

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[2] Other circuits that follow the Ninth Circuit include the First Circuit (*In re Stadium Management Corp.*, 895 F.2d 845 (1st Cir. 1990)), the Second Circuit (*United States v. Salerno*, 932 F.2d 117 (2nd Cir. 1991)), the Fifth Circuit (*In re Gilchrist*, 891 F.2d 559 (5th Cir. 1990)), the Seventh Circuit (*In re Sax*, 796 F.2d 994 (7th Cir. 1986)), and the Eleventh Circuit (*In re The Charter Co.*, 829 F.2d 1054 (11th Cir. 1987).

In this case, Petitioner not only failed to obtain a stay pending appeal, Petitioner failed to even try to obtain a stay.

Respondent acknowledges that the Third Circuit Court of Appeals has held that in addition to looking at an appellant's failure to obtain a stay of a sale order, it will further 'consider the remedies requested by the appellant to ascertain whether a remedy can be fashioned that will not affect the validity of the sale. *In re Krebs Chrysler-Plymouth, Inc.* 141 F.3d 490 (3rd Cir. 1998).[3] That rule does not differ from the majority of the circuits so as to "threaten the consistency of federal law." In fact, the Ninth Circuit has shown a willingness to examine other possible remedies. (See, e.g., *In re Sun Valley Ranches, Inc.*, 823 F.2d 1373 (9th Cir. 1987)). As such, there is no real "conflict" between the circuits making certiorari necessary on this issue.

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[3] The record in this instant appeal shows that the Bankruptcy Court considered alternative proposals made by the Debtor in opposition to the Trustee's settlement agreement, and found that the Debtor's arguments/proposals were unsubstantiated by evidence. (See BAP Memorandum, page A-8).

II.

THE NINTH CIRCUIT COURT OF APPEALS CORRECTLY DISMISSED THESE APPEALS AS MOOT BASED UPON THE PETITIONER'S FAILURE TO OBTAIN A STAY OF THE ORDER APPROVING THE TRUSTEE'S COMPROMISE WITH THE VENTURA GROUP.

The Bankruptcy Appellate Panel for the Ninth Circuit, as affirmed by the Ninth Circuit Court of Appeals, dismissed the instant appeals as moot because Petitioner failed to either seek or obtain a stay of the order approving the Trustee's Compromise with Respondent the Ventura Group.

In the Memorandum issued by the BAP, as affirmed by the Ninth Circuit, the BAP concluded that the two Appeals were, and are moot, as follows:

> "The debtor failed to obtain a stay pending appeal of the Settlement Agreement which proposed to dismiss the debtor's first Appeal as well as settle the Choi litigation. As a result of debtor's failure to obtain a stay, the Marina property has been returned to the Ventura Group which has invested money in repairing and re-leasing the Marina to third parties. As the rights of third parties have intervened, we DISMISS THE PRESENT APPEALS AS MOOT."[4]

Petitioner has apparently mis-read the BAP decision by focusing not on the Order Approving the Compromise between the Trustee and the Ventura Group, but rather,

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[4] See BAP Memorandum, page A-13, attached to the Petition For Writ.

on the Order Denying the Debtor's Motion to Assume the Sublease. Specifically, the gravamen of Petitioner's Petition For Writ is as follows:

> The limitation of [11 U.S.C. § 363(m)] does not apply to the facts of this case. Ventura Group obtained possession by an order denying the assumption of the sublease and operation of 11 U.S.C. § 365(d)(4), which required immediate surrender of the property. There have been no cases discovered that applies bankruptcy's mootness rule to the facts of this case, and the Court of Appeals must have assumed that the turnover of subleased property pursuant to 11 U.S.C. 365(d)(4) was analogous to a sale of property under 11 U.S.C. § 363. Accepting that assumption for argument, those cases that do not follow the per se rule are instructive.

Simply stated, this was not the focus of the BAP or the Ninth Circuit Court of Appeals.

Nor did the Court of Appeals make a summary determination, with no inquiry into whether or not any relief could be had by the Debtor, as asserted by the Petitioner. Specifically, Petitioner states:

> The evidence before the Court failed to reveal any details from which the BAP could conclude any change in circumstances or effects on third parties not before the Court.

This is simply not true. In its decision, the BAP, as affirmed by the Ninth Court of Appeals, balanced the Debtor's failure to obtain a stay pending appeal against the rights and effects on third parties, *including Respondent the Ventura Group*, and concluded:

> "As a result of debtor's failure to obtain a stay, the Marina property has been returned to the Ventura Group which has invested money in repairing and re-leasing the Marina to third parties. As the rights of third parties have intervened, we DISMISS THE PRESENT APPEALS AS MOOT."[5]

Thus, it was the Debtor's failure to obtain a stay of the Order Approving the Compromise and Sale between the Trustee and the Ventura Group that led to the dismissal of these appeals.

CONCLUSION

These appeals were found to be moot by both the Ninth Circuit Court of Appeals and the Bankruptcy Appellate Panel for the Ninth Circuit, and the Petitioner has failed to raise any new issue and/or assert any new authority not otherwise previously considered. Further, Petitioner has failed to show any compelling factor as to why this Court should grant certiorari.

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[5] See BAP Memorandum, page A-13, attached to the Petition For Writ.

WHEREFORE, for the reasons set forth herein, Respondents request that the petition for writ of certiorari be denied.

Respectfully submitted,

JULIAN BACH
Counsel of Record
ARTER & HADDEN, LLP
725 S. Figueroa Street, 34th Floor
Los Angeles, CA 90017
(213) 430-3300

Attorneys for Respondent,
Michael S. Kogan, Chapter 7 Trustee

RICHARD I. WIDEMAN
ATTORNEY AT LAW
27 El Paseo
Santa Barbara, CA 93101
(805) 884-9521

Attorneys for Respondents,
Ventura Group, LLC; John Scott;
Channel Harbors, Inc.; and
Stearns Wharf/Pacific Harbors
LTD

Dated: August 2, 1999